THE EFFECT OF A PLEDGE BY A GRATUITOUS BAILEE.—The law of pledges might well be considered one of the best-settled branches of the common law; yet the authorities yield little assistance toward a solution of the problems presented by a recent case in the English Court of Appeals.[1] In this case the plaintiff handed jewelry to one Miller, under an arrangement whereby he might examine it and decide whether he would make a loan to the plaintiff on the security of the jewelry. Miller then pawned the jewelry with the defendant, who took it in good faith and advanced £1000 to Miller. Two days later, Miller arranged with the plaintiff to lend her £500, she giving him her note for £600 payable in six equal monthly instalments, and allowing him, as she thought, to retain possession of the jewelry as security for the payment of the note. Miller afterwards borrowed £300 from one Berners, and deposited with him the plaintiff's note. Miller committed suicide. The plaintiff paid Berners £400 on the note, with notice of the defendant's position, and sued the defendant for the return of the jewelry, making no tender to him. The court held that the plantiff could not recover.

Since the plaintiff at no time gave Miller any other evidence of the ownership of the jewelry than its bare possession, which is never enough to estop the true owner of a chattel from setting up his title, even against a purchaser[2] or pledgee[3] in good faith, the defendant's claim must be based on a right in the jewelry acquired by him, and not on any estoppel against the plaintiff. And since any right in the jewelry acquired by the defendant must have been derived from Miller, the decision of the case must depend on the effect of the transactions between the plaintiff and Miller. The first question involved is therefore: what right in the jewelry, if any, passed to Miller upon its delivery to him by the plaintiff?

The court took the view that, although the delivery of the jewelry by the plaintiff to Miller constituted him a gratuitous bailee, "it was a good delivery for the purpose of creating a pledge whenever that pledge was created," and that the arrangement whereby Miller made the loan to the plaintiff "went to feed the defendant's title."[4]

The court concedes that when the jewelry was delivered to Miller, he became merely a gratuitous bailee, and not a pledgee. If Miller had been a pledgee of the jewelry when he pawned it with the defendant, Miller's pledgor, the plaintiff, could not have recovered the jewelry from the defendant without tendering to him the

[1] Blundell-Leigh v. Attenborough, 125 Law Times R. 386 (Eng. 1921); L. R. (1921), K. B. 235 (C. A.).

[2] Levi v. Booth, 58 Md. 305, 42 Am. Rep. 302 (1882).

[3] Cox v. McGuire, 26 Ill. App. 315 (1887).

[4] Quotations from the opinion of Bankes, L. J.

plaintiff's debt to Miller.[5] And if Miller had simply retained possession of the jewelry, and later loaned money to the plaintiff with the understanding that the jewelry was a pledge for repayment, the agreement of pledge would clearly have been valid.[6] But the plaintiff here undoubtedly had the right to reclaim the jewelry from Miller if no loan had been arranged between them; this plainly indicates that, instead of the contract of pledge relating back to the delivery, the delivery must be taken to relate forward to the contract of pledge.[7] The contract of pledge, then, was completed only when Miller made his loan to the plaintiff, because up to that moment the plaintiff might rightfully have refused to enter into such a contract. It follows that when Miller pledged the jewelry to the defendant and until Miller made his loan to the plaintiff, Miller could have no greater rights in the jewelry than those of a gratuitous bailee. So it would seem that Miller's pledge of the jewelry to the defendant would terminate the bailment, and enable the plaintiff to recover the jewelry at once.[8]

But the further questions must be considered: did the plaintiff lose his right to possession of the jewelry, or did the defendant acquire a right to its possession as against the plaintiff by virtue of Miller's loan to the plaintiff after Miller had pledged the jewelry to the defendant?

To hold that the plaintiff lost his right to possession of the jewelry by this transaction would be to maintain that the plaintiff, by accepting a loan and intending to confer on Miller the right of a pledgee to possession of the jewelry, has effected a valid contract of pledge, although (1) the plaintiff did neither then nor afterwards deliver the jewelry to Miller, and although (2) Miller was not then in possession thereof. To adopt this conclusion would extend the doctrine of "constructive delivery" of a pledge to a length which is warranted by no previous decision and sustained by no authority.[9]

[5] Donald v. Suckling, 35 L. J. Q. B. 232 (1876); Talty v. Freedmans' Savings & Trust Co., 93 U. S. 322, 23 L. Ed. 886 (1876).

[6] Brown v. Warren, 43 N. H. 430 (1862); Van Blarcom v. Broadway Bank, 9 Bosw. 532 (N. Y. 1862).

[7] Delivery of the pledge to the pledgee has always been considered essential to the validity of a contract of pledge, 2 Kent Comm. 581; Story, Bailments, s. 297; Bonsey v. Amee, 8 Pick. 236 (Mass. 1829), Thompson v. Andrews, 8 Jones 453 (N. C. 1862) except where the pledgee was already in possession, Brown v. Warren, *supra;* Van Blarcom v. Bank, *supra:* this was called a "constructive delivery."

"If the pledgee has the thing already in possession, as by a deposit or a loan, there the very contract transfers to him, by operation of law, a virtual possession thereof as a pledge, the moment the contract is completed." Story, Bailments, s. 297.

[8] Cox v. McGuire, *supra;* Gottlieb v. Hartman, 3 Col. 53 (1876).

[9] See note 7, *supra.* The attempted pledge by the plaintiff to Miller neither complies with the rule nor is embraced in the exception stated therein. See also note 13, *infra.*

It is submitted that such a change in the law of pledges is unwise, since it complicates a transaction whose simplicity the law has always aimed to preserve.[10]

The only case cited by the court is Whitehorn Bros. v. Davison.[11] In that case the plaintiffs sent a necklace to one Bruford with a bill of sale to him, not intending to sell it to him, but intending that he should offer it to one of his clients; Bruford pledged the necklace to the defendant, and told the plaintiffs he had sold it as intended. Upon the plaintiffs' asking for payment, several interviews took place between them and Bruford, as a result of which the plaintiffs invoiced the necklace to Bruford and took time bills in payment from him. The bills were dishonored, and the plaintiffs sued the defendant for the return of the necklace. The court held the plaintiffs could not recover.

The court in this case did not consider the first transaction of the plaintiffs with Bruford as constituting a sale to him, but viewed the subsequent invoice of the necklace to him, and taking of bills from him, as a voidable sale, induced by Bruford's fraudulent misrepresentations as to his client. Bruford, then, got a voidable title to the necklace, but he got it after he had pledged the necklace to the defendant; and the court states that the voidable title then got by Bruford inured to the defendant's benefit and "would go to feed the defendant's title." [12]

Whitehorn Bros. v. Davison may be distinguished from the principal case by the fact that in the former, Bruford clearly acquired a title, though a voidable one, in the necklace when it was invoiced to him;[13] whereas in the latter, no authority supports the view that Miller ever acquired a right to retain possession of the jewelry as against the plaintiff.

[10] If the transaction referred to creates a valid contract of pledge, it might be held that the defendant was entitled in equity to the plaintiff's note, Whitney v. Peay, 24 Ark. 22 (1862). Whether or not Berners took the note from Miller as a holder in due course does not appear. But he seems to have been a holder of the note, since he collected the amount due thereon from the plaintiff; and he gave £300 for the note; therefore, it would appear the court was bound to consider him a holder in due course, Bills of Exchange Act (45 & 46 Vict., c. 61, 1882), s. 29, 30. Berners' equity in the note is then superior to the defendant's, Kernohan v. Manss, 53 Ohio St. 118, 41 N. E. 258 (1895), and he would be entitled to enforce payment of the note against the plaintiff.

[11] 104 Law Times R. 234 (Eng. 1911); L. R. (1911), 1 K. B. 463 (C. A.).

[12] Quotations from the opinion of Buckley, L. J., 104 Law Times R. 241 (1911).

[13] From this it appears that Whitehorn Bros. v. Davison, *supra*, does not support the proposition, that in the principal case the plaintiff effected a valid pledge to Miller by merely accepting a loan from him and agreeing that he should retain the jewelry as a pledge, after Miller had lost possession of the jewelry.

In both cases, however, the court maintains that the right acquired by the defendant's pledgor relates back to the time when he first got possession of the chattel, and so inures to the defendant's benefit, although the defendant's pledgor could transfer no valid right to the defendant at the time of the pledge. This theory has not heretofore been recognized in the law of personal property. From the language of the opinions in both cases as to "feeding the defendant's title," it would appear that the court is borrowing from the law of real property the doctrine of "estoppel by deed." Under this doctrine, a grantor of property to which he had no title was estopped by the giving of his deed from setting up an after-acquired title as against his grantee.[14] In such cases, it has been inaccurately said that the grantor's after-acquired title went to feed the grantee's title.[15] The distinction between the effect of delivery of a deed to realty, and delivery of possession of a chattel, even with a restricted power of sale,[16] does not need to be pointed out. Both Whitehorn Bros. v. Davison[17] and the principal case would therefore seem to have been decided on a false analogy. And no theory is perceived to justify a holding that the defendant acquired a right to possession of the jewelry as against the plaintiff, in the principal case, by virtue of Miller's loan to the plaintiff, after Miller had pledged the jewelry to the defendant.

Moreover, a fact in the principal case unnoticed by the court appears to establish the plaintiff's right of recovery beyond question: before Miller committed suicide, he borrowed £300 from Berners, and deposited with Berners the plaintiff's note. The report does not state whether by this transaction Miller purported to sell the note to Berners, or merely to pledge it. However, it is stated that the plaintiff paid Berners £400 on account of the sum due on the note. So it appears that Miller had transferred the plaintiff's debt to Berners. It has been held that where a pledgee transferred the debt for which the pledge was given as security, without transferring the pledge, the pledgor can recover the pledge from the pledgee.[18] It is submitted that this holding is sound, since under these circumstances the pledgor remains liable for the debt to the pledgee's assignee, and there can be no reason why the pledgee should retain possession of the pledge. Under this view, the plaintiff would be entitled to re-

[14] Hannon v. Christopher, 34 N. J. Eq. 459 (1881).

[15] Doe d. Christmas v. Oliver, 10 B. & C. 181 (Eng. 1829). Actually, the grantee in such a case got no title, since he was allowed the option of taking the land or of recovering the purchase money from his grantor, after the grantor had acquired title. Resser v. Carney, 52 Minn. 397, 54 N. W. 89 (1893). Tiffany, Real Property, s. 545.

[16] Heilbronn v. McAleenan, 16 N. Y. St. Rep. 457, 1 N. Y. S. 875 (1888).

[17] 104 Law Times R. 234 (Eng. 1911); L. R. (1911), 1 K. B. 463 (C. A.).

[18] Morgan v. Dugan, 30 Atl. 558 (Md. 1894).

cover the jewelry from Miller, even though the plaintiff's acceptance of the loan from Miller, and agreement that Miller should hold the jewelry in pledge after he had parted with its possession be considered as completing a valid contract of pledge. Miller obviously could have had no greater rights in the jewelry than those of a pledgee; and a pledgee can transfer to a sub-pledgee, in the absence of an estoppel against the pledgor,[19] only his own rights in the pledge.[20] Therefore it appears that the plaintiff was entitled to recover in any view of he case.

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[19] McNeil v Tenth National Bank, 46 N. Y. 325, 7 Am. Rep. 341 (1871).
[20] Merchants' Bank v. Livingston, 74 N. Y. 223 (1878).